

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT

PAMELA COLEMAN, an individual,  
MARY BOWER, an individual, and  
KATHLEEN PAISON, an individual,

Plaintiffs,

vs.

BOSTON SCIENTIFIC  
CORPORATION, a Massachusetts  
corporation, and DOE  
MANUFACTURERS one through one  
hundred.

Defendants.

Case No. 1:10-CV-01968-OWW-SKO

Judge: Oliver W. Wanger  
Crm.: 3

**ORDER REGARDING DEFENDANT  
BOSTON SCIENTIFIC  
CORPORATION'S MOTION TO  
DISMISS**

Complaint filed: 10/20/2010

On April 11, 2011, Defendant Boston Scientific Corporation's ("BSC") Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) and, in the alternative, Motion to Dismiss Certain Plaintiffs Pursuant to Fed.R.Civ.P. 12(b)(3) and Fed.R.Civ.P. 20, came on regularly for hearing by the Court. After considering the motion, the arguments of counsel, and all papers presented to the Court, the Court orders as follows:

ORDER GRANTING  
DEFENDANT'S MOTION TO DISMISS

1           **A. Product Identification**

2           The complaint does not comply with Rule 8 of the Federal Rules of Civil  
3 Procedure because Plaintiffs do not allege which state they underwent the procedures  
4 to implant the mesh devices or the medical facilities involved. In addition, the  
5 complaint is ambiguous with respect to whether each Plaintiff had the same type of  
6 mesh device implanted. When a Plaintiff is unable to identify a specific medical  
7 device in her complaint, information revealing when, where, and why a procedures  
8 was performed should be pleaded to assist manufacturers in identifying which of its  
9 products is implicated.

10           Plaintiffs' complaint must be amended to (1) state clearly whether Plaintiffs'  
11 claims are based on one defective device common to all Plaintiffs, or whether claims  
12 asserted based on multiple mesh devices that share a common defect; and (2) state  
13 clearly the location where each Plaintiffs' respective procedures was performed.

14           **B. Breach of Implied Warranty**

15           Plaintiffs' cause of action for breach of implied warranty is not cognizable  
16 under California law because privity of contract is required for implied warranty  
17 claims. *See, e.g., Evraets v. Intermedics Intraocular, Inc.*, 29 Cal. App. 4th 779, 857  
18 (1994); *Blanco v. Baxter Healthcare Corp.*, 158 Cal. App. 4th 1039, 1058 (2008).  
19 Plaintiffs' fourth cause of action for breach of implied warranty is dismissed, with  
20 prejudice.

21           **C. Breach of Express Warranty**

22           Plaintiffs' cause of action for breach of express warranty fails because the  
23 complaint does not allege facts sufficient to give rise to a plausible basis to believe  
24 that Plaintiffs relied on any representations made by BSC in their decision to use the  
25 mesh devices. *See Fieldstone Co. v. Briggs Plumbing Products, Inc.* 54 Cal.App.4th  
26 347, n.10 (1997). Plaintiffs' allegations that BSC advertised the mesh devices as safe  
27 and effective are conclusory and lack general information describing the alleged  
28

1 conduct. Such conclusory allegations are insufficient to support a plausible basis for a  
2 claim of breach of express warranty. *Quatela v. Stryker Corp.*, 2010 U.S. Dist.  
3 LEXIS 133706 at \*4-6 (N.D. Cal. 2010). Plaintiffs' fifth cause of action for breach of  
4 express warranty is dismissed, with leave to amend.

5 **D. Fraud and Fraud by Concealment**

6 "To comply with Rule 9(b), allegations of fraud must be specific enough to give  
7 defendants notice of the particular misconduct which is alleged to constitute the fraud"  
8 and the allegations must include the "time, place, and specific content of the false  
9 representations as well as the identities of the parties to the misrepresentations."  
10 *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal citations omitted).  
11 Plaintiffs' general allegations do not comply with the elevated pleading standard for  
12 fraud-based claims as set forth in Rule 9(b) of the Federal Rules of Civil Procedure.  
13 Specifically, the complaint does not allege facts sufficient to support an inference that  
14 BSC knew of the alleged defects of the mesh devices at any time relevant to the  
15 complaint or that any false representations were made to Plaintiffs on which they  
16 relied. Plaintiffs' sixth and seventh causes of action for fraud and fraud by  
17 concealment are dismissed, with leave to amend.

18 **E. Negligent Misrepresentation**

19 Plaintiffs' cause of action for negligent misrepresentation fails because, *inter*  
20 *alia*, the complaint does not allege when such representations were made. Moreover,  
21 the complaint does not allege facts sufficient to give rise to an inference that, at the  
22 time BSC made alleged representations concerning the safety of the mesh devices,  
23 they had any reason to know of the dangers Plaintiffs complain of or that they made  
24 any misrepresentations without a reasonable basis for believing them to be true.  
25 Plaintiffs' eighth cause of action for negligent misrepresentation is dismissed, with  
26 leave to amend.

1 **F. Violation of State Consumer Fraud and Deceptive Trade Practices Act**

2 As discussed above, the complaint is insufficient with respect to the fraud and  
3 misrepresentation claims and the complaint is fatally vague with respect to which  
4 mesh devices are the subject of Plaintiffs' claims. As there are no predicate claims  
5 alleged in the complaint, Plaintiffs' claims of unfair competition or violation of  
6 California Business and Professions Code sections 17200 *et seq.* and 17500 *et seq.*  
7 cannot stand. Plaintiffs' ninth cause of action for violation of state consumer fraud  
8 and deceptive trade practices act is dismissed, without prejudice.

9 **G. Venue and Joinder**

10 BSC contends Plaintiffs Mary Bower and Kathleen Paison have been  
11 improperly joined in this action under Rule 20 of the Federal Rules of Civil Procedure  
12 and their claims should be dismissed under Rule 12(b)(3) of the Federal Rules of Civil  
13 Procedure for failure to assert proper venue. The propriety of joinder and venue  
14 cannot be ascertained due to the pleading deficiencies discussed above. BSC may  
15 renew its objections to joinder and venue after the filing of an amended complaint.

16 Based on the foregoing, **IT IS HEREBY ORDERED** that Plaintiffs' fourth  
17 cause of action for breach of implied warranty is dismissed, with prejudice. Plaintiffs'  
18 first, second, third, fifth, sixth, seventh, eighth, and ninth causes of action are  
19 dismissed, without prejudice.

20 **IT IS FURTHER ORDERED** that Plaintiffs file an amended complaint within  
21 sixty (60) days of electronic service of the Court's Memorandum Decision Regarding  
22 Motion to Dismiss. (Doc. No. 27.) Defendant BSC shall answer or otherwise respond  
23 to the amended complaint within twenty (20) days of the service of the amended  
24 complaint.

25  
26 Dated: May 2, 2011

/s/ OLIVER W. WANGER  
United States District Court Judge